Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

FRED DAVIS,

Petitioner,

v.

HANOVER INSURANCE COMPANY, et al.,

Respondent.

Petition For Writ Of Certiorari
To The First Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

FRED DAVIS
353 BRYANT STREET
MALDEN, MASSACHUSETTS 02148
(617) 322-8223

ISSUES PRESENTED

I.

Should this court grant certiorari to protect the petitioner's rights under the United States Constitution, Massachusetts Civil Rights Act and Massachusetts Declaration of Rights.

II.

Amendment V: states in pertinent part: "cannot be deprived of life, liberty or property without due process of law".

III.

Amendment XIV: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws".

IV.

Massachusetts Civil Rights Act, M.G.L. ch 12 § 11I protects citizens from being deprived of their United States Constitutional Rights by individuals and allows the filing of a Civil Action against these parties.

V.

Massachusetts Declaration of Rights: Article XI: **remedy by recourse of the laws; obtaining of right and justice, completely promptly.** " Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it: Completely, and without denial: promptly, and without delay: ..."

VI.

Complaint was written in accordance with "Step by Step" A simple Guide to Filing a Civil Action In The United States Distict Court District of Massachusetts. Written and obtained by the United States District Court District of

Massachusetts.

VII.

Was the granting of a Motion to Dismiss by the respondents appropriate based on the facts and evidence presented to the lower court.

VIII.

There was a final order from the Norfolk Superior Court.

IX.

Did Hanover Insurance Company's servants attorney Mark F. Mahnken and attorney George R. Suslak act in bad faith?

X.

The facts and evidence clearly indicate that there was a conspiracy between Hanover Insurance Company's servant Mark F. Mahnken and Judge Thomas E. Connolly to deprive the petitioner of his rights to due process of law and equal protection of law along with the State color of law.

XI.

The Public Interest is in jeopardy. Are the citizens of Massachusetts going to be deprived of their right to appeal?

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Petitioner, Fred Davis, respectfully prays that a writ of certiorari issue to review decision of the United States District Court For The First Circuit and grant the order that the petitioner be paid damages in the amount of $85,000.00. (eighty five thousand dollars) plus interest and costs along with legal fees which the court deems appropriate. Punitive damages in the sum of $50,000.00 (fifty thousand dollars) and any other relief the court deems appropriate.

OPINIONS BELOW

The lower court's ruling was for the respondent and is attached Appendix B.

The United States Appeals Court for the First Circuit dismissed the action and is attached Appendix C.

JURISDICTION

October 11, 1996, the United States Appeals Court for the First Circuit dismissed the action. This petition is filed within the 90 days of the United States Appeals Court for the First Circuit decision.

This Court's jurisdiction is invoked under

28 United States Code.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "cannot be deprived of life, liberty, or property, without due process of law".

The Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the law".

STATEMENT OF THE CASE

The petitioner, Fred Davis is both a senior citizen and is partially disabled.

The petitioner's partial disability is a result of a motor vehicle accident caused by the negligence of Hanover Insurance Company's insured.

Hanover Insurance Company and their servant attorney Mark F. Mahnken formulated the contract and used entrapment upon the petitioner, Davis that if he signed the contract he would be paid $20,000.00 dollars for his injuries.

The contract clearly stated that $20,000.00 dollars would be paid within 30 days.

Contract was signed by Davis on September 20, 1991, therefore, the last day for payment was on October 20, 1991. Hanover Insurance Company kept the signed contract since September 20, 1991, including the present date and never paid Davis.

Petitioner made several attempts to obtain his money and Hanover Insurance Company's servant Mark F. Mahnken threatened Davis telling him that he was not going to get the money and just forget it.

A year and six months had past and he was not paid nor was the petitioner's signed contract returned to him, therefore, on March 10, 1993, the petitioner filed his action for breach of contract in the Norfolk Superior Court in Dedham, Massachusetts.

September 24, 1993, respondents filed a mot-

ion for Summary Judgment and Counter Claim.

Davis filed a timely objection to the respondents Motion For Summary Judgment and Counter claim.

There was oral argument before Judge Thomas E. Connolly on respondents Motion For Summary Judgment and Counter Claim. Judge Connolly allowed the respondents Summary Judgment and dismissed the respondents Counter Claim.

The petitioner took exceptions to the judge's order allowing the respondents Summary Judgment and informed him that he was going to appeal his ruling on the Summary Judgment.

Hanover's servant/attorney Mark Mahnken said to the petitioner "this case will never go to the Appeals Court, you are not going to get the money and just forget it".

January 21, 1994, petitioner files his Notice of Appeal and is attached Appendix D.

Norfolk Superior Court does not assemble the record and it is not forward to the Massachusetts Court of Appeals.

September 22, 1994, Davis files Second Notice of Appeal. Davis informed by the Clerk that Judge Connolly does not want this case to go to the Appeals Court.

Davis files third, fourth, fifth requests for Immediate Assemble of the Record and Forward to the Appeals Court, however, the Norfolk Superior Court continues to inform the petitioner that judge Connolly and the respondents' attorney do not want this case to go to the Appeals Court.

Finally, after filing six notices of assemble of the record and forward the action to the Appeals Court attached Appendix A failed, since petitioner's Constitutional Rights were deprived and state violations were being involved petitioner filed his Complaint in the United States District Court for the First Circuit.

Respondents filed Motion to Dismiss. Motion is allowed.

Petitioner appeals to the United States Court of Appeals for the First Circuit. Appeal is denied.

Now the issues are before this Honorable Court.

REASON FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO PROTECT THE PETITIONER FROM BEING DEPRIVED OF HIS CONSTTITUTIONAL RIGHTS AS SET FORTH IN THE UNITED STATES CONSTTITUTION

March 10, 1996, petitioner filed a civil action against the respondents for breach of contract United States v. Windstar 64 United States Law Weekly page 4739.

Norfolk Superior Court allowed the respondents Summary Judgment and denied the respondents counter claim.

Petitioner filed a timely appeal, however, the record was not assembled and forwarded to the Appeals Court.

Petitioner filed his Sixth Notice For Immediate Assemble Of The Record attached Appendix A.

Petitioner was informed by the clerk that Hanover Insurance Company's attorney Mark F. Mahnken and Judge Connolly do not want this case to go to the Appeals Court.

Petitioner was deprived of his Constitutional Rights of due process of law and equal protection of the law.

The United States Constitution Amendment v: states in pertinent part: "cannot be deprived of life, liberty, or property, without due process of due process of law."

The United States Constitution Amendment XIV: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

II. CERTIORARI SHOULD BE GRANTED TO PROTECT THE PETITIONER FROM BEING DEPRIVED HIS CONSTITUTIONAL RIGHTS AS SET FORTH IN MASSACHUSETTS CIVIL RIGHTS ACT, M.G.L. CHAPTER 12 SECTION 11I.

Hanover Insurance Company's servant/attorney, Mark F. Mahnken made threats and intimidated the petitioner.

He said, "this case will never go to the Appeals Court, you are not going to get the money and just forget it."

Petitioner was informed by the Clerk of the Norfolk Superior Court that Mark F. Mahnken and Judge Thomas E. Connolly will not allow the record to be assembled and go to the Appeals Court. They don't want this case to go to the Massachusetts Appeals Court.

Massachusetts Civil Rights Act: protects citizens from being deprived of their United states constitutional rights by indivduals and allows the filing of a Civil Action against these parties.

Petitioner will argue that Hanover Insurance Company's servant/attorney made threats to the petitioner denying him his Constitutional Rights to due process of law and equal protection of the law by acting jointly with a state actor(Judge Connolly) in not allowing the record to be assembled and forward to the Appeals Court, therefore, this action is appropriate Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991).

III. CERTIORARI SHOULD BE GRANTED TO PROTECT PETITIONER FROM BEING DEPRIVED OF HIS RIGHT IN OBTAINING JUSTICE AS SET FORTH IN MASSACHUSETTS DECLARATION OF RIGHTS ARTICLE XI

Massachusetts Declaration of Rights Article XI: **remedy by recourse of the laws; obtaining of right and justice, completely promptly. "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it: Completely, and without denial: promptly, and without delay...."**

The petitioner had the right to obtain justice promptly and without delay.

A year and six months had passed from the time petitioner filed his Notice of Appeal in the Norfolk Superior Court and until the petitioner filed his action in the United States District Court.

Petitioner's rights were deprived.

IV. CERTIORARI SHOULD BE GRANTED, THE LOWER COURT ERRED IN LAW IN DISMISSING THE ACTION

The petitioner filed his Complaint as set forth in "Step by Step" a Simple Guide to Filing a civil action in the United States District Court of Massachusetts. This guide is written and

distributed by the United States District Court of Massachusetts which states in pertinent part: "Do not worry that your COMPLAINT is not Professionally written. The court will take into consideration that your are PRO SE litigant and untrained in drafting legal documents".

In addition, "Failure to the Complaint to set forth specific facts to support its allegations is not a sufficient ground for dismissal of the suit, since the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim" Conley v. Gibson 355 U.S. 14. In, CF. Maty v Grasselli Chemical Co., 303 U.S. 197, "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits".

The court must look at the record in the light most favorable to the part opposing the motion, indulging all inferences in that party's favor Hahn v. Sargent 523 F 2d 461, 464 (1st Cir. 1975) Cert denied. The court of appeals, like the district court, must view the entire record in the light most hospitable to the party opposing summary judgment indulging all reasonable in that party's favor Griggs-Ryan v. Smith, 904 F 2d 112, 114(1st Cir. 1990). The evidence must be examined in the light most favorable to the plaintiff LeClair v. Silberline 379 Mass. 21

at 23 (1979).

V. DID HANOVER INSURANCE COMPANY'S SERVANTS/ATTORNEYS MARK F. MAHNKEN AND GEORGE R. SUSLAK ACT IN BAD FAITH?

Hanover's Insurance Company's servant Mark F. Mahnken, threatened and intimidated the petitioner telling him that this case will never go to the Appeals Court and you are not going to get the money just forget it.

Mark F. Mahnken lied to the petitioner's employers by telling them that he had a court order to obtain all documents in the petitioner's personnel file, including medical records, however, this was not the case. The court did not issue such a court order.

Mahnken obtained privileged information including names and addresses of petitioner's beneficiaries, Internal Revenue W-2 forms and he used these Internal Revenue W-2 forms to become an informer for the Internal Revenue which resulted in a tax audit for the petitioner.

George R. Suslak second servant/attorney misrepresented the facts to the court. He was not in the courtroom when Judge Connolly gave his final decision.

VI. WAS THERE A CONSPIRACY BETWEEN JUDGE CONNOLLY AND MARK MAHNKEN?

Judge Connolly and Mark Mahnken deprived the petitioner his Constitutional Rights to due process of law and equal protection of the law, when they would not allow the clerk to assemble the record and forward it to the Appeal Court for review of the decision.

Based on the foregoing facts and evidence it appears that there is a conspiracy between Judge Connolly and Mark Mahnken.

VII. IS THE PUBLIC INTEREST IN JEOPARDY?

The public interest is involved. Based on the court's ruling this case will be used as a precedent which now means a judge/attorney or both can stop a case from being appealed to a higher court.

CONCLUSION

WHEREFORE, petitioner Fred Davis respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari and order that both damages and punitive damages be paid to the petitioner and any other appropriate relief.

Respectfully submitted,

Fred Davis
353 Bryant Street
Malden, Ma 02148
(617) 322-8223

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

DEDHAM SUPERIOR COURT CIVIL ACTION
NO. 93-00574

FRED DAVIS, PLAINTIFF)
)
VS.)
)
HANOVER INSURANCE COMPANY, ET AL,)
DEFENDANTS)

SIXTH NOTICE FOR IMMEDIATE ASSEMBLE OF THE RECORD

Now comes the plaintiff, Fred Davis, in the above-cited action and moves the court for the sixth time to immediately assemble the record and forward it forthwith to the Massachusetts Appeals Court.

The plaintiff filed a Notice of Appeal and five prior Notices For Immediate Assemble of the Record and forward it forthwith to the Massachusetts Appeals Court.

However, this court has wilfully failed to fulfill its obligation and assemble the record and forward it to the Massachusetts Appeals Court.

Therefore, again for the sixth time the plaintiff moves the court to assemble the record and forward it forthwith to the Massachusetts Appeals Court.

App. 2

By,

s/ Fred Davis
Fred Davis, Plaintiff
353 Bryant Street
Malden, Ma 02148

CERTIFIED MAIL
Z 233 017 979

CC: Nicholas Barbadoro

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FRED DAVIS, Plaintiff	)	
v.	)	C.A. No. 95-cv-11837-MLW
HANOVER INSURANCE COMPANY, JOHN F. O'BRIEN, CHAIRMAN OF THE BOARD OF HANOVER INSURANCE, Defendants.	)	

MEMORANDUM AND ORDER

WOLF, D.J. May 17, 1996

On August 16, 1995, plaintiff Fred Davis filed this action seeking injunctive and monetary relief stemming from alleged violation of his state and federal constitutional rights. On September 5, 1996, the defendants filed a motion to dismiss complaint. For the reasons stated herein, this motion must be ALLOWED.

I. The Complaint.

According to his complaint, Mr. Davis brought claims of breach of contract and unfair trade practices against the defendants in Massachusetts Superior Court in 1993. The defendants moved for summary judgment on all counts of the plaintiff's state court complaint. This motion was sub-

sequently allowed.

On January 21, 1994, plaintiff filed a notice of appeal with the Superior Court. Since that time, plaintiff has filed five additional notices of appeal. According to the complaint the Superior court "has knowingly and wilfully refused to assemble the record and forward it to the Massachusetts Court of Appeals." Plaintiff asserts further that "both Judge Thomas Connolly and the defendant's attorney will not allow the record to be assembled and go to the Appeals Court because they don't want this case to go to the Massachusetts Appeals Court." As a result of these purported activities, plaintiff claims "[v]iolations of State and Federal Constitutional Right: Equal protection of the law. Obstruction of justice."

II. Analysis

Plaintiff has not stated a viable claim against the defendants in this case. First, the complaint does not identify any actions taken by the defendants which could have caused the plaintiff harm. constitutional or otherwise. The complaint speaks only of actions taken by the Superior Court and the defendants' lawyer.

Second, even if the complaint can be read to implicate the defendants, the constitutional claims cannot survive. It is well-established

that the Fourteenth Amendment and the federal civil rights statute, 42 U.S.C. § 1983, are implicated only by action taken under color of state law. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 156 (1978); Lugar v. Edmondson Oil Co. 457 U.S. 922 (1982). Defendants in this case are private actors. See Edmondson v. Leesville CONCRETE Co., 500 U.S. 614, 619 (1991) ("[w]ith a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities.") It is conceivable that plaintiff could argue that the alleged actions of the defendants' attorney in "not allow[ing] the record to be assembled" are sufficiently intertwined with state processes so as to constitute the requisite state action. See, eg., Edmondson 500 U.S. at 618-28. Even so, this one-sentence allegation against the defendants' attorney is too vague and conclusory to allow this action to proceed under such a theory.

To the extent that plaintiff brings this action under the Massachusetts Civil Rights Act covers purely private action, it requires some form of "threats, intimidation, or coercion." See M.G.L. ch. 12 § 11H. No "threats, intimidation, or coercion" by any of the defendants have been alleged in this case.

Finally, as an alternative ground for dismissing this action, it is clear that the plain-

tiff, has suffered no constitutional injury by any failure of the Superior Court to assemble his record for appeal. Mr. Davis currently has no right to appeal the judgment against him in state court. Under M.G.L. c. 231 § 113, a party can appeal only a "final judgment of the superior court....." In the Superior Court action, the defendant filed a counterclaim against Davis, seeking various forms of injunctive and declaratory relief. This counterclaim was not acted upon by the superior court judge at the time he granted summary judgment for the defendants on plaintiff's complaint as a result, the judge's decision on the summary judgment motion was not a "final judgment" under § 113. See Litton Business Telephone systems, Inc. v. Scwartz, 9 Mass. App. Ct. 847 (1980) (dismissing appeal "because the judgment entered....does not dispose of the counterclaim of the individual defendants"); E.W. Foster Co. v. McLaughlin, 7 Mass. App. Ct. 865 (1979) ("when there is an adjudication of the claims of fewer than all the parties, no judgment has yet been entered from which an appeal can be taken.") Accordingly, in the absence of a motion for entry of a final judgment under Mass. R. Civ. P. 54 (b) or a petition for interlocutory relief under M.G.L. ch 231 § 118, plaintiff must await resolution of the defendants' counterclaim before appealing the judgment against him.

Accordingly, for the foregoing reasons, the defendants' motion to dismiss is hereby ALLOWED.

s/ Mark F. Wolf
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 1650

FRED DAVIS,
Plaintiff, Appellant,

v.

HANOVER INSURANCE COMPANY, JOHN F. O'BRIEN, CHAIRMAN OF THE BOARD OF HANOVER INSURANCE COMPANY
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(Hon. Mark L. Wolf, U.S. District Judge)

Before

Torruella, Chief Judge,
Cyr and Stahl, Circuit Judges.

Fred Davis on brief pro se.
George R. Suslak and Stanton & Lang on brief for appellees.

OCTOBER 11,1996

Per Curiam. As the record indicates, at the time the instant case was filed in federal court no judgment had yet entered in state court on the counterclaim of defendants/appellees. Since all claims had not been adjudicate, plaintiff/appellant had no right at that time to appeal the judgment dismissing his action. See Litton Business Telephone Systems, Inc. v. Schwartz, 9 Mass. App. Ct. 865, 400 N.E. 2d 281, (1979) (dismissing appeal "because the judgment entered...does not dispose of the counter claim"). Consequently, he suffered no injury from the alleged failure of the state court to assemble his record for appeal.

Affirmed.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS SUPERIOR COURT
NO. 93-00574

****
FRED DAVIS, *
Plaintiff *
*
v.s. *
*
HANOVER INSURANCE *
COMPANY, ET AL *
Defendants *
****

NOTICE OF APPEAL

Now comes the plaintiff, Fred Davis, in the above-cited action and appeals the court's decision dated January 14, 1994, (Connolly, J) to the Massachusetts Appeals Court.

By,

s/ Fred Davis
Fred Davis, Plaintiff
353 Bryant Street
Malden, Ma 02148

CERTIFICATE OF SERVICE

I, hereby certify that I mailed a copy of the above document to Mark F. Mahnken Driscoll, Gillespie & Stanton 200 Broadway Lynnfield, Ma 01940.

Date 1-21-94 s/Fred Davis